Supreme Court U.S.
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No. ___

In the
Supreme Court of the United States

P.M. REALTY AND INVESTMENTS, INC.,
A Florida Limited Liability Company,
Petitioner,

v.

CITY OF TAMPA, FLORIDA,
A Florida Incorporated Municipality,
Respondents.

On Petition for a Writ of Certiorari to the Florida Second District Court of Appeal

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the rejection of the Rules of Evidence in adult entertainment cases that are in direct conflict with this Court's decision in *City of Los Angeles v. Alameda Books,* and the existing split of authority and rampant confusion interpreting that decision, justify review by this Court?

2. Does this Court's historical desire to protect the First Amendment, even in areas of great controversy, justify review by this Court?

3. Does the refusal or inability of multiple state and federal courts to consistently implement the Rules of Evidence in applying the *Alameda Books* decision, resulting in a denial of justice throughout the Nation, justify this Court's review?

STATEMENT PURSUANT TO RULE 29.6

Petitioner, P.M. Realty and Investments, LLC, a Florida Limited Liability Company, states that it has no corporate parents, and that no publicly held company owns 10% or more of any stock or interest in that entity.

TABLE OF CONTENTS

QUESTION PRESENTED i

STATEMENT PURSUANT TO RULE 29.6 ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES v

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 2

A. The Factual Background Supporting Review . . . 3

REASONS FOR GRANTING THE WRIT 13

I. The Rejection Of The Rules Of Evidence In Adult Entertainment Cases Is In Direct Conflict With This Court's Decision In *City of Los Angeles v. Alameda Books* And Further Aggravates The Existing Split Of Authority And Confusion Interpreting That Decision 15

II. This Court has Historically Shown a Desire to Protect the First Amendment, Even in Areas of Great Controversy, and Should Do So in this Action 17

III. The Refusal Or Inability of the Courts To Consistently Apply The Rules Of Evidence In Applying The *Alameda Books* Decision Has Resulted In A Denial Of Justice Throughout the Nation 21

CONCLUSION 29

APPENDIX

Appendix A:11/22/06 Florida Appellate Court, the Second District Court *Per Curiam* affirming the granting of a permanent injunction 1a

Appendix B: 9/9/05 Hillsborough County, Florida Circuit Court Order denying the Motion for Rehearing 3a

Appendix C: 8/16/05 Hillsborough County, Florida Circuit Court Order granting permanent injunction . 5a

Appendix D: City of Tampa Code, Chapter 27, Sec. 27-191, YC-1 Zoning District 14a

TABLE OF AUTHORITIES

Cases

22nd Ave Station, Inc. v. City of Minneapolis,
429 F. Supp. 2d 1144 (D.Minn. 2006) 24

Baby Dolls Topless Saloons, Inc. v. City of Dallas,
295 F.3d 471 (5th Cir. 2002), *cert. denied*,
Case & Point v. City of Dallas,
537 U.S. 1088 (2002) 22

Barnes v. Glen Theatre, 501 U.S. 560 (1991) 17

Basiardanes v. City of Galveston,
682 F.2d 1203 (5th Cir. 1982) 18

Ben's Bar v. Village of Somerset,
316 F.3d 702 (7th Cir. 2003) 19, 22, 24

Bourjaly v. United States,
483 U.S. 171, 107 S.Ct. 2775 (1987) 20

Center for Fair Public Policy v. Maricopa County, Arizona,
336 F.3d 1153 (9th cir. 2003), *cert. denied*,
541 U.S. 973 (2004) 22

Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.,
447 U.S. 557, 100 S.Ct. 2343,
65 L.Ed.2d 341 (1980) 26

City of Los Angeles v. Alameda Books, Inc.,
535 U.S. 425 (2002) . . . . . *passim*

Creswill v. Knights of Pythias,
225 U.S. 246 (1912) 12

Daubert v. Merrell Dow Pharmaceuticals, Inc.,
509 U.S. 579, 113 S.Ct. 2786 (1993) 19

Daytona Grand, Inc. v. City of Daytona Beach,
2006 U.S. Dist. Lexis 41164 (M.D. Fla. 2006) . . . 24

Dima v. High Forest Township,
2003 WL 22736561 (D.Minn. 2003) 23, 24

Edenfield v. Fane,
507 U.S. 761, 113 S.Ct. 1792,
123 L.Ed.2d 543 (1993) 26, 27

Encore Videos, Inc. v. City of Antonio,
330 F. 3d 288 (5th Cir.), *cert. denied*,
540 U.S. 982 (2003) 21, 24

Erotique Shop Inc. v. City of Grand Prairie,
2006 U.S. Dist. Lexis 85992 (N.D. TX. 2006) 21

Fantasy Ranch, Inc. v. City of Arlington,
459 F.3d 546 (5th Cir. 2006) 22

Fantasy Ranch, Inc. v. City of Arlington,
2004 WL 1779014 (N.D. Texas 2004) 22

Fiske v. Kansas, 274 U.S. 380, (1927) 12

Flanigan's Enterprises Inc. v. Fulton County,
2006 WL 2927532 (N.D. Ga. 2006) 25

G.M. Enterprises, Inc. v. Town of St. Joseph,
350 F.3d 631 (7th Cir. 2003), *cert. denied*,
543 U.S. 812 (2004) 19, 22

Giggles World Corp. v. Town of Wappinger,
341 F. Supp. 2d 427 (SDNY 2004) 21, 22

Hammerstein v. Superior Court,
341 U.S. 491 (1951) 3

Heideman v. South Salt Lake City,
348 F.3d 1182 (10th Cir. 2003) 22

Interstate Circuit, Inc. v. Dallas,
390 U.S. 676 (1968) 3

Jacobellis v. Ohio, 378 U.S. 184 (1964) 12

Kahana v. City of Tampa,
683 So.2d 618 (Fla. 2DCA 1996) 5

Kentucky Restaurant Concepts, Inc. v. City of Louisville,
209 F. Supp. 2d 672 (W.D. Kentucky 2002) 22

Krueger v. City of Pensacola,
759 F.2d 851 (11th Cir. 1985) 18

Leverett v. City of Pinellas Park,
775 F.2d 1536 (11th Cir. 1985) 18

Members of City Council v. Taxpayers for Vincent,
466 U.S. 789, 104 S.Ct. 2118 (1975) 17

Metromedia, Inc. v. San Diego,
453 U.S. 490, 101 S.Ct. 2882,
69 L.Ed.2d 800 (1981) 26

Michigan-Wisconsin Pipeline Co. v. Calvert,
347 U.S. 157 (1954) 3

Miller v. California, 413 U.S. 15 (1973) 12

N.W. Enterprises v. City of Houston,
352 F.3d 162 (5th Cir. 2003), *cert. denied*,
Ice Embassy Inc. et al. v. City of Houston, Texas, et al.,
543 U.S. 958 (2004) 22

New York v. Ferber, 458 U.S. 747 (1982) 12

New York Times Co. v. Sullivan,
376 U.S. 254 (1964) 15

P.M. Realty Investments, Inc. v. City of Tampa,
779 So.2d 404 (2nd DCA 2000)(*PM I*) 6

P.M. Realty Investments, Inc. v. City of Tampa,
863 So.2d 1269 (Fla. 2nd DCA 2004)(*PM II*) 6, 7

Pap's A.M. v. City of Erie,
529 U.S. 277, 120 S.Ct. 1382 (2000) 14, 28

Peek-a-Boo Lounge of Bradenton, Inc. v. Manatee County, Florida,
337 F.3d 1251 (11th Cir. 2003), *cert. denied*,
541 U.S. 988 (2004) 19, 23

R.V.S v. City of Rockford,
361 F.3d 402 (7th Cir. 2004) 24

Redner v. Dean,
29 F.3d 1495 (11th Cir. 1994),
cert. den., 115 S.Ct. 1697 (1995) 17

Renton, 475 U.S., at 51, 106 S.Ct. 925 . . . . . 18, 27, 28

Rubin v. Coors Brewing Co.,
514 U.S. 476, 115 S.Ct. 1585,
131 L.Ed.2d 532 (1995) 26, 27

S.O.B., Inc. v. County of Benton,
317 F.3d 856 (8th Cir.), *cert. denied*
540 U.S. 820 (2003) 22

Schad v. Borough of Mt. Ephraim,
101 S.Ct. at 2183-2184 . . . . . 18, 28

Southeastern Promotions Ltd. v. Conrad,
420 U.S. 546, 95 S. Ct. 1239 (1975) 17

State of Florida Department of Transportation v. Free Course, Inc., Thirteenth Judicial Circuit, Hillsborough County Case No. 03-2747 10

Sterling v. Constantin, 287 U.S. 378 (1932) 12

Sullivan v. Texas, 207 U.S. 416 (1908) 3

Tippens v. State, 897 So. 2d 1278 (Fla. 2005) 1

Worldwide Video of Washington, Inc. v. City of Spokane,
368 F.3d 1186 (9th Cir. 2004) 22

XLP Corp. v. Lake County,
359 Ill. App. 3d 239,
832 N.E.2d 480 (2nd Dist. 2005) 16

Young v. American Mini Theatres,
427 U.S. 50 (1976) . . . . . *passim*

Constitutional Provisions

U.S. Const. Amend. 1 . . . . . *passim*

U.S. Const. Amend. 5 2

Fla Const. Art. V, § 3(b)(3) 1

Statutes and Rules

28 U.S.C. § 1257 . . . . . 2, 3

42 U.S.C. § 1983 3

Tampa City Code Chapter 27, Sec. 27-191 . . . . . 2, 7

Rule 14.1(h) 3

PETITION FOR A WRIT OF CERTIORARI

Petitioner, P.M. Realty and Investment, LLC, respectfully petitions this Court for a writ of certiorari to review the judgment of the Florida Second District Court of Appeal, the highest state court subject to review in this action.

OPINIONS BELOW

The Opinion of the Florida Appellate Court, the Second District Court of Appeal, dated November 22, 2006, *per curiam* affirming the granting of a permanent injunction, is reported at *P.M. Realty and Investments v. City of Tampa,* 944 So.2d 364 (Fla. 2ndDCA 2006)(Table), and is reproduced at Appendix A to this Petition. The Order of the Hillsborough County, Florida Circuit Court, dated August 16, 2005, granting a permanent injunction, unreported, is reproduced at Appendix C. The Order of the Hillsborough County, Florida Circuit Court, dated September 9, 2005, denying the Motion for Rehearing, unreported, is reproduced at Appendix B.

JURISDICTION

The Florida Second District Court of Appeal entered its Opinion, a simple per curiam affirmance without comment or citation, on November 22, 2006. Based on Article V, Section 3(b)(3), Fla. Const., a per curiam affirmance is unreviewable by the Florida Supreme Court.[1] Based on the nature of this appellate ruling, Petitioner has exhausted all state appellate remedies, thus making the state district court appellate decision the "highest court of the state" for the purposes of

[1] *Tippens v. State*, 897 So. 2d 1278 (Fla. 2005).

this Court's jurisdiction. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional provisions

The First Amendment to the Constitution of the United States of America provides that "Congress shall make no law . . . abridging the freedom of speech . . . "

The Fifth Amendment, made applicable by the Fourteenth Amendment to the Constitution of the United States of America, provides that "...no state shall deprive any person of life, liberty or property without due process of law."

Statutory provisions

Chapter 27, Sec. 27-191, "Termination of Certain Uses," "Adult uses, temporary help centers and blood donor centers are uses not permitted or permissible within the district..." (YC-1 Zoning District). This City of Tampa Code Section is reproduced as App. D, 14a.

STATEMENT OF THE CASE

Petitioner, P.M. Realty and Investments, LLC sought appeal from the Hillsborough County, Florida Circuit Court, after the entry of an Order granting a permanent injunction and a subsequent order denying any rehearing of the permanent injunction order. The appellate court, the Florida Second District Court of Appeal, rendered its decision on Petitioner's appeal from the judgment and order of the Circuit Court, which rejected all assertions of First Amendment

violations (all brought pursuant to 42 U.S.C., Section 1983) resulting from the imposition of City of Tampa legislation alleged to be in direct violation of Plaintiff's Federal Constitutional rights, and resolved all issues in favor of the City of Tampa. In compliance with Rule 14.1(h), Petitioner states that the issues of "Federal Question" stature were the core issues in the case from its inception, as well as the core issues in all appellate review. The "Federal Questions" formed the basis of all judicial determinations made in the actions involved.

The decision of the Appellate Court was rendered on November 22, 2006. No petition for rehearing was filed, because the *per curiam* nature of the ruling precluded any request for rehearing or higher appellate review. That decision is reproduced as App. A, 1a. On the basis that the highest state court available, pursuant to the Florida Rules of Appellate Procedure, issued the decision, the instant Petition for Writ of Certiorari is directed to the Florida Second District Court of Appeal, in conformity with the directives of 28 U.S.C., Section 1257.[2]

A. The Factual Background Supporting Review

This case is critical, because it underscores the pervasive confusion and inconsistent rulings caused by dramatic (and often miserably unsuccessful) attempts by both state and federal courts to apply this Court's decision in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002)

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[2] *See Sullivan v. Texas*, 207 U.S. 416 (1908); *Hammerstein v. Superior Court*, 341 U. S. 491, 492 (1951); *Michigan-Wisconsin Pipeline Co. v. Calvert*, 347 U.S. 157, 160 (1954); and *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 678 n. 1 (1968).

(hereinafter, *Alameda Books*) in challenges to adult entertainment legislation. The issues in this case go to the heart of a party's due process rights to challenge restrictive legislation with any confidence that relevant ***evidence*** will be properly evaluated, and the proper ***evidentiary standard*** will be applied. These are due process rights deemed sacrosanct in ***every*** state and federal jurisdiction, but, based on the apparent inability (or simple refusal) to apply the *Alameda Books* decision in any fair or meaningful way, these rights are seldom enjoyed by affected adult businesses. The merit of this Petition is not so much the isolated review of this action, but more to urge this Court to provide much needed clarification of the "burden shifting" analysis articulated in the *Alameda Books* decision. Candidly, while Petitioner would assert the *Alameda Books* decision provides a relatively discernible "roadmap" regarding the quantity and quality of ***evidence*** to be evaluated in such challenges, the breadth and scope of the misinterpretations, confusion and conflict in decisions, at every level of state and federal courts, strongly bodes in favor of this Court accepting this case. Respectfully, the clarification of important constitutional issues suffering from the cacophony of confusion surrounding those issues is, quite candidly, part of this Court's primary "job description."[3]

The actual "facts" of the instant action have played out in similar situations in scores of "adult entertainment" cases for

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[3] The issues raised in this petition and the multiple conflicting applications of the Alameda Books decision are also raised in an action just recently docketed in this Court: *Deja Vu of Nashville, Inc., et al., Petitioners v. Metropolitan Government of Nashville and Davidson County, Tennessee*, Case No. 06-1078; Docketed: February 2, 2007. Lower Ct: United States Court of Appeals for the Sixth Circuit Case No.: (05-5895).

years. In this action, Petitioner sought to operate an adult entertainment dance facility (the "Club Flamingo") in the ***entertainment district*** of Ybor City, Florida, a type of arts and entertainment "historical district," not unlike Bourbon Street in New Orleans.[4] The original Complaint filed by the City in this action on April 8, 1996, sought a determination that the City was entitled to injunctive relief prohibiting the operation of an "adult cabaret" ***in the entertainment district of "Ybor City,"*** when that area in the City of Tampa was then undergoing explosive growth and development, with the major emphasis on "entertainment" and "night life." In February of 1996, P.M. Realty opened the "Club Flamingo," located at 1502 E. 7th Avenue, in Ybor City. The location was the subject of extensive investment and renovations, exceeding $400,000.00 in improvements to the previous "nightclub" layout.

The case went up on its first appeal after the entry of a temporary injunction against the operation of the dance club, and this first state appeal dealt with an Order Granting the City of Tampa's Amended Motion for Temporary Injunction on December 18, 1998. This temporary injunction precluded the operation of the "Club Flamingo" in the YC-1 Zoning District of Ybor City, even though it was a part of the City of Tampa well known for its vibrant nightlife and diverse entertainment facilities. Critically, this first appeal dealt with the unique standard of review utilized in evaluating the appeal of injunctions, that being review of the trial court decision as

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[4] The character of Ybor City was even recognized by the Florida Courts in *Kahana v. City of Tampa*, 683 So.2d 618 (Fla. 2DCA 1996),"Once a separate community famous for its cigar factories, Ybor City is now a historic district in Tampa with a thriving night life."

an "abuse of discretion." On the basis of largely inapplicable, non-First Amendment *jurisprudence*, the state appellate court upheld the entry of the temporary injunction in *P.M. Realty Investments, Inc. v. City of Tampa*, 779 So.2d 404 (2nd DCA 2000)(*PM I*).

Subsequent to the affirmance of the temporary injunction, the case was again prosecuted before the Hillsborough County Circuit Court, during which the City sought a permanent injunction, and, prior to any final hearing or ***proper evidentiary analysis of the evidence and testimony*** offered by P.M. Realty, the state circuit court, ignoring all changes in circumstances, the changes in the subject legislation, and "new U.S. Supreme Court decisions," granted a summary judgment based on the improper application of the "law of the case" doctrine. Arguing that it was entirely improper to utilize the "law of the case" doctrine, and that the entry of summary final judgment and permanent injunction denied P.M. Realty meaningful access to the courts, and, operated as a denial of due process, particularly the opportunity to avail itself of the "burden shifting" procedures articulated in *Alameda Books*, P.M. Realty filed a second appeal.

On the second appeal, unlike the first, in reversing the entry of summary judgment, the appellate court embraced the importance of the this Court's developing First Amendment cases, and specifically recognized the way that this Court had finally indicated that adult businesses were ***not,*** as previously feared, ***outside the application of the rules of evidence***. Essentially, it was recognized that there was a burden on the government to support anti-adult business legislation. The Florida Second District Court of Appeal reversed the trial court, primarily on the strength of the evidentiary mandates of *Alameda Books*. "***Accordingly, we conclude the trial court must accord P.M. Realty another hearing at which it applies***

current law to the relevant evidence."P.M. Realty Investments, Inc. v. City of Tampa, 863 So.2d 1269 (Fla. 2nd DCA 2004) (Emphasis added) (*PM II*). On remand, with ***no rebuttal*** from the City, P.M. Realty proved that the "Club Flamingo" had ***no adverse impact*** on adjoining property values, that the "Club Flamingo" did ***not*** attract undesirable patrons to the area, and that the operation of "Club Flamingo" ***did not cause any increase in crime***, that the calls for police service to the "Club Flamingo" were ***virtually non-existent*** in comparison to calls for police service to the other businesses in Ybor City.

In addition, challenging the procedural validity of the relevant legislation, "P.M. Realty" proved that the City of Tampa had ***never put any evidence into any record before the City Council*** to justify the adult entertainment restrictions perfunctorily thrown into the YC-1 Zoning District ordinance, specifically Sec. 27-191,"Termination of Certain Uses," (App. D, 14a) which ***simply banned adult businesses*** (and temporary help centers and blood donor centers) in that district. To establish this, it was pointed out to the original trial judge that, "at no point during any of the adoption procedures held in the City of Tampa did they ever put on any additional evidence," to justify the YC-1 Adult Use Zoning Restrictions. This assertion was based on the fact that the City of Tampa ***never had a legislative predicate for the YC-1 Adult Use Zoning Restrictions.***

In light of this the state appellate court's embrace of the of the concepts articulated in *PM II*, focusing specifically on the arguments that (1) there was absolutely ***no legislative predicate*** for the YC-1 Adult Use Zoning Restrictions, and (2) that the City ***never*** put forward any evidence to show that the operation of the "Club Flamingo," at any time, caused any adverse secondary effects, and ***never rebutted P.M.***

Realty's extensive evidentiary showing that the subject business did not cause any adverse secondary effects, the closure of this club represents a travesty which has been repeated over and over, in courts throughout the Country. Based on this, the merits of the instant petition should be embraced.

The final trial took place on November 29th and 30th, 2004. During trial, the City called Gina Grimes, former Assistant City Attorney, who testified about the re-adoptions of the City's entire zoning code and also testified as to various materials in the City archives ***that were never relied on for the YC-1 Adult Use Zoning Restrictions***. Grimes testified that she did not know if Council members reviewed any of the predicate materials, but she did testify that she "reviewed and discussed these materials with Council members," although there is no record of this at any public hearing. That was the extent of the City's "legislative predicate.

P.M. Realty then put on the testimony of Dr. Randy Fisher, a research methodologist. He testified as to his extensive experience in evaluating the research methodology (or lack thereof) utilized in the City of Tampa's "legislative predicate" for the adult use restrictions (not to be confused with or applied to the YC-1 zoning restrictions). Dr. Fisher testified that the City of Tampa's record, and various other research information, simply ***did not show any scientifically reliable evidence of secondary effects***. The next witness called by "P.M. Realty" was Dr. Terry Danner, a criminologist, who testified that specific research done of the "Club Flamingo," as well as other research conducted in other areas, established that present day "gentlemen clubs," in general, and the "Club Flamingo," specifically, did not show any "uniquely criminogenic" characteristics. Dr. Danner testified that there was no correlation between the

adult businesses studied and any incidents of prostitution, even though the trial court overlooked and misapprehended this testimony.

The next witness to testify was Richard Schauseil, a real estate expert. He testified that there was absolutely no evidence that the operation of the "Club Flamingo" caused any adverse impact on property values, and no evidence that any other "upscale gentlemen's clubs" studied showed any adverse impact on any adjoining property values. The next witness was Joe Redner, sole member of P.M.Realty, and owner and operator of the "Club Flamingo." He testified that "Club Flamingo" did not cause any secondary effects in the form of urban blight, increases in crime, or any other negative impacts, and he described the stringent policies regarding the club's security procedures for the safety of its performers and patrons.

The City then called land use planner Ethel Hammer, who testified about a number of general zoning issues, valiantly trying to establish some correlation between the operation of adult businesses and secondary effects. Ms. Hammer conceded that she had ***never studied adult uses*** before and thereafter only testified generically about urban blight and some arbitrarily chosen comparison areas, coming up with a "crimes per acre" analysis, none of which actually established any causation between adult uses and "secondary effects." Ms. Hammer, in another case where she was questioned on her testimony, later testified under oath:

> "Q. ...Oh. Okay. Do they have vacancy rates there that seem to be higher?
>
> "A. Yes.

"Q. Really? And do you think that might be related to the adult uses?

"A. I did not say that in my report or in my deposition. I said there was a correlation; I didn't say that there was a cause."[5] (Emphasis added).

Ms. Hammer's testimony included no data, whatsoever, about the operation of "Club Flamingo." The next witness was Major Jane Castor, who conceded that, "mainly the adult entertainment investigations that we conducted were in ***massage parlors***. There was generic testimony about, "prostitution arrests," but these arrests were not for the "Club Flamingo," and could not have been, since the Major testified her only experience was "from '98 to 2001," and the "Club Flamingo" was closed in December 1998. Critically, the Major stated, "I never – under my watch, we never did any investigations. As a matter of fact, I never stepped foot in Club Flamingo." The Major conceded that:

"Q. Testifying here today, do you have any statistical data, any type of reports, any specific documents that relate to numbers of percentages or anything of that kind?

"A. No sir."

The next witness to testify was Detective John Sluckis, who testified about problems with entirely different and shabby clubs operated by another corporate entity, and he also

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[5] *State of Florida Department of Transportation v. Free Course, Inc.*, Thirteenth Judicial Circuit, Hillsborough County Case No. 03-2747.

conceded that other business locations had significant incidents of prostitution. Throughout his testimony, Detective Sluckis ***did not identify a single criminal episode occurring at "Club Flamingo."***

Trial was continued until April 12 and 13, 2005, at which time "P.M. Realty" called Private Investigator Joseph Malone, who testified that, for the "Club Flamingo," there were ***no calls for prostitution, no calls for sexual assault, no calls for narcotic offenses, and that "Club Flamingo" had less calls for service than any of the adjoining properties he had studied.*** P.M. Realty then recalled Dr. Randy Fisher in rebuttal to the testimony of Ethel Hammer, and Dr. Fisher testified that her study was fatally flawed because it did not test any hypothesis accurately, and failed to use any properly selected control groups.

Also recalled in rebuttal was Dr. Terry Danner, who testified that Ms. Hammer's data was totally flawed from a criminological standpoint, and that "makes the conclusions untrustworthy because they are not based on a solid reliable methodology." The next witness was Eric Rahenkamp, a member of the American Institute of Certified Planners, who also vigorously criticized Ethel Hammer's report, even after being accused of "ethical" transgressions by the City, since he performed services for the City. He testified that his obligation was to be truthful and to refute shoddy planning evidence, nothing more.

The next witness was Eric Roahrig, a licensed real estate appraiser, who also testified that the "conclusions" in Ethel Hammer's report suggesting that the existence of adult businesses had an adverse impact on adjoining property values was totally unsupported by the data she relied on and that, based on a much more elaborate and in depth analysis of

property values, there was "no measurable market substantial difference" in property values that would be affected by the presence of an adult entertainment business. The final witness called by "P.M. Realty" was Mr. Redner, who testified that he had personally purchased several residential properties in the area of the "Mons Venus," another adult establishment owned and operated by Mr. Redner, and that there was no "lack of confidence or any other adverse consequences caused by the proximity of the adult use business" to these residential properties.[6]

After a variety of post trial and "closing argument" motions and hearings, on August 15, 2005, the trial court

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[6] Normally, this Court seldom delves into state court's findings of facts, but there is an exception "where a Federal right has been denied as the result of a finding shown by the record to be without evidence to support it; or where a conclusion of law as to a Federal right and a finding of fact are so intermingled as to make it necessary, in order to pass on a Federal question, to analyze the facts." *Fiske v. Kansas,* 274 U.S. 380, 385-86, (1927). And see *Creswill v. Knights of Pythias*, 225 U.S. 246,261 (1912); *Sterling v. Constantin*, 287 U.S. 378, 398 (1932). Pursuant to the second exception mentioned in the *Fiske* opinion, the Court frequently makes independent examination of facts that are intermingled with legal conclusions when necessary to determine whether a person has been deprived by a state court of a right secured by the Constitution. This exception has been consistently embraced where the First Amendment is concerned, as set forth in *Jacobellis v. Ohio,* 378 U.S. 184,189(1964) (the Court's "duty to apply the applicable rules of law upon the basis of an independent review of the facts of each case...has been particularly true where rights have been asserted under the First Amendment guarantees of free expression.") See also *New York v. Ferber*, 458 U.S. 747,774 n. 28 (1982); *Miller v. California*, 413 U.S. 15, 25 (1973).

issued an Order Granting Permanent Injunction (App. C, 5a). After identifying what appeared to be total confusion between the highly questionable "legislative record" asserted as what the City relied on for its adult use restrictions, and seeing that the trial court failed to grasp the fact that there was ***absolutely no pre-enactment legislative predicate to support the YC-1 Adult Use Zoning Restrictions***, "P.M. Realty" filed a Motion for Hearing and/or Clarification. The City filed opposition papers, and on September 9, 2005, the trial court issued an Order Denying the Motion for Rehearing (App. B, 3a). On September 16, 2005, "P.M. Realty" filed a Notice of Appeal, and the Florida Second District Court of Appeal issued their per curiam affirmance on November 22, 2006. (App. A, 1a).

REASONS FOR GRANTING THE WRIT

This case presents an important and critical question regarding issues that have both confused and tortured courts at every level of state and federal judiciaries ever since this Court's divided decision in *City of Los Angeles v. Alameda Books, supra,* particularly the statements made regarding "burden shifting," and what ***analytical framework*** and type of ***evidentiary burden*** must be utilized in evaluating challenges to adult entertainment legislation. Since this legislation directly impinges on the exercise of fundamental First Amendment rights and imposes regulatory and operational restrictions that, under the guise of being adopted to address the alleged "adverse secondary effects" (purportedly caused by the adult businesses sought to be regulated), and often results in the annihilation of those businesses, this Petition seeks to eliminate the practice of countless courts in "picking and choosing" isolated language from the *Alameda Books* decision to support totally inconsistent and irreconcilable approaches to the "burden shifting" analysis articulated therein.

This case is about one of the most precious aspects of the First Amendment: at what point can the government impose "censorship under the guise of legislation." This goes to the core fundamental right of citizens to choose what type of entertainment they wish to partake of without unjustified governmental interference or the total elimination of First Amendment freedoms. ***This Petition satisfies each of the factors listed in this Court's Rule 10 that guide this Court's decisions on granting certiorari review.*** The decision of the Florida Appellate Court is in direct and irreconcilable ***conflict with decisions of this Court***, the questions presented identify a critical ***conflict among the federal circuits***, and both state and federal courts across the Nation have cried out for clarification of the Byzantine framework that this Court's recent divided decisions on adult entertainment legislation have created, even if unintentionally.

Of equal importance, the Florida Appellate Court has decided a ***significant question of federal law,*** arising under the Free Speech Clause of the First Amendment, that has been consistently interpreted in different ways by multiple state and federal courts, on critical issues that have not been clearly settled by this Court, and that cry out for resolution. This conflict has been repeated at every state and federal level, either explicitly, or by implication. This has been brought about by differing and irreconcilable opinions from the various courts dealing with the issue. This problem must be corrected.

It is of the utmost constitutional importance that this Court grant this Petition. The Petitioners' speech may fall "only within the outer ambit of the First Amendment's protection," *Pap's A.M. v. City of Erie*, 529 U.S. 277, ___, 120 S.Ct. 1382, 1391 (2000), but if "the price of liberty is eternal vigilance," as stated by the Framers of the Constitution, then

protecting those "outer perimeters" is crucial to the maintenance of Free Speech. The First Amendment is concrete evidence of our "profound national commitment" to the principle that "debate on public issues should be uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). But in virtually every level of the judiciary today, and robustly evident throughout the Federal Circuits misconstruing or attempting to "fill in the blanks" of this Court's prior adult entertainment decisions, the right to Free Speech is in extreme peril. If censorship can occur with no burden on the government to prove any governmental interest served by that censorship, freedom is lost.

This case involves nothing less important than the First Amendment, and the decision sought to be reviewed in this Court, as set forth below, is worthy of consideration, if for no other reason than the confusion in this area of the law repeatedly complained of by virtually every court trying to fairly and consistently apply the Rule of Law to these critical First Amendment issues.

I. The Rejection Of The Rules Of Evidence In Adult Entertainment Cases Is In Direct Conflict With This Court's Decision In *City of Los Angeles v. Alameda Books* And Further Aggravates The Existing Split Of Authority And Confusion Interpreting That Decision

The confusion over applying the *Alameda Books* case, and the apparently "optional" and sporadic allowance of any proper evidentiary analysis of the "burden shifting" procedure articulated in that case, has been repeatedly complained about by many courts. For example, one court articulated the problem as follows:

"[This]... presents an issue that has ***often been litigated in the courts of this nation***: when and to what extent may the government regulate an adult use...***[R]esolution of this issue is complicated by court's inability to articulate a clear set of principles to govern cases such as these.***"[7]

Through this action, Petitioner hopes to establish an unequivocally "***clear set of principles,***" and to establish an appropriate evidentiary framework for the courts, not only in Florida, but every other court in the Country, seeking to have all courts apply ***consistently*** and with ***precision*** a minimum of evidentiary fairness in this controversial but critical area of Free Speech. This is required by the barest modicums of both the equal protection doctrine and substantive due process. Petitioner also hopes that this Court grants review to reconcile the monumental conflict between the Federal Circuit Courts in their application of *Alameda Books*, and its state and Federal progeny. Unfortunately, despite this Court's best attempts, the state of the law is in chaos. More than one court has complained that, "In short, guidance from the Supreme Court on this issue has been somewhat ***less than clear***...therefore, ***we begin our analysis by setting forth the law as best we can derive it from applicable precedent***," and that court then complains about the, "... ***somewhat nebulous state of the case law***...,"[8] Many courts are virtually crying out, almost directly, for the necessity of this Court to enunciate a ***clear evidentiary standard***, eliminating any question, and eliminating any "nebulous state of the case law" that would interfere with the consistent and properly guided evaluation of similar issues by the courts everywhere these

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[7] *XLP Corp. v. Lake County*, 359 Ill. App. 3d 239, 832 N.E.2d 480 (2nd Dist. 2005).

[8] *XLP Corp. v. Lake County*,832 N.E.2d at 480.

issues frequently arise. If the number of cases where identical concerns are articulated does not inspire this Court to accept review of this matter, then countless courts will be inevitably destined to evaluate similar challenges regarding the critical issues presented by the instant action, and relegated to the same evidentiary chaos that has resulted from either an inability or a flat refusal to properly apply *Alameda Books*, all at a grave cost, not only to liberty, but to the preservation of the Rule of Law. It is respectfully requested that this Court grant this Petition.

II. This Court has Historically Shown a Desire to Protect the First Amendment, Even in Areas of Great Controversy, and Should Do So in this Action

From a historical perspective, this Court has consistently shown a desire to protect the First Amendment, even, and sometimes particularly, in areas of great controversy. As this Court has stated, there is a presumption that any governmental restraint on expressive conduct is impermissible. *Southeastern Promotions Ltd. v. Conrad*, 420 US 546, 95 S. Ct. 1239 (1975). The *Alameda Books* decision, and the articulation of the "burden shifting" procedures articulated therein, was not entirely unprecedented. Early on, ***simply applying the rules of evidence***, this Court held that, once a party demonstrates that a regulation deprives it of protected freedom of expression, the burden shifts to the governing body to justify that infringement. *See Members of City Council v. Taxpayers for Vincent*, 466 US 789, 803, 104 S. Ct. 2118 (1975). To address the issue from its most basic starting point, any form of legislation restricting any businesses deemed to be "adult entertainment" must be analyzed under the First Amendment. *Barnes v. Glen Theatre*, 501 U.S. 560 (1991); *Redner v. Dean*, 29 F. 3d 1495 (11th Cir. 1994), *cert. den.*, 115 S.Ct. 1697 (1995).

From the earliest decisions dealing with the regulation of adult entertainment businesses, it was established that the legislation at issue could only be justified if it regulated or addressed a legitimate governmental interest, established by ***evidence*** showing the existence of problems that would be favorably addressed by the legislation, to prevent the so-called "adverse secondary effects" ***shown to exist,*** that were allegedly engendered by adult entertainment establishments. *Young v. American Mini Theatres*, 427 U.S. 50 (1976), *Renton, supra*. A requirement of this concept was that the existence of these adverse secondary effects be ***established*** through competent, substantial evidence. *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir. 1985); *Leverett v. City of Pinellas Park*, 775 F.2d 1536 (11th Cir. 1985); *Basiardanes v. City of Galveston*, 682 F.2d 1203 (5th Cir. 1982). *Alameda Books* was not the first case to identify this fundamental requirement. Under the clear mandates of the law articulated in *Alameda Books*, it is a fundamental concept of statutory construction to make sure that the restrictions imposed by legislation are actually supported by the evidence trying to establish the existence of an otherwise unremediated governmental interest. *See Basiardanes v. City of Galveston,* 682 F2d 1203, 1213 (5th Cir. 1982). Every Ordinance requires the Court:

> "...To examine the strength and legitimacy of the governmental interest behind the ordinances and the precision with which the ordinance is drawn. Unless the ordinance ***advances*** significant governmental interests and ***accomplishes*** such advancement without undue restraint of speech, the ordinance is invalid." *Basiardanes* at 1214, citing *Schad v. Borough of Mt. Ephraim,* 101 S.Ct. at 2183-2184. (Emphasis added).

Justice Souter's dissent in *Alameda Books*, as will be expanded on later in this Petition, is even more on point. In light of these authorities, the most critical consideration in the instant action is simply whether woefully inadequate or missing evidence can somehow "carry the day" for the government. The variations about ***what can be considered as evidence***, and what level of scrutiny should be applied, is, unfortunately, but truthfully, "all over the road." *Alameda Books*, more than anything else, articulated that there should be a minimal burden for acceptable "legislative evidence," but, once challenged, the government had to carry its burden with evidence of "equal dignity," competent and substantial, if not rising to the level of *Daubert*.[9] In all fairness, as Justice Souter articulated in his dissent in *Alameda Books*, if there is a "science" that lends itself to the evaluation of the veracity of a given issue, wouldn't the "search for the truth" be aided by its use?

Problems arise because, while virtually every court evaluating the ***Alameda Books*** case has found that Justice Kennedy's concurrence should be recognized as the decisive holding in that case,[10] there is a clear conflict in the way that the various courts dealing with these issues have attempted to apply the holdings in *Alameda Books* to their respective actions.

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[9] *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 113 S.Ct. 2786 (1993), the benchmark case wherein this Court put strict limits on the admissibility of "junk science" into evidence.

[10] *Ben's Bar v. Village of Somerset*, 316 F.3d 702 (7th Cir. 2003), *SOB v. County of Benton* 317 F.3d 856 (8th Cir. 2003), *Peek-A-Boo Lounge v. Manatee County*, 337 F.3d 1251 (11th Cir. 2003), *G.M. Enterprises, Inc. v. Town of St. Joseph*, 350 F.3d 631 (7th Cir. 2003).

Even though there is agreement on who articulated the "holding" of *Alameda Books,* there is ***no agreement*** as to what type of evidence is relevant, or what that "burden" actually is, after it "shifts." Establishing that the rules of ***evidence*** apply in every judicial proceeding, it is critical to emphasize that **the rules of evidence must be "construed to secure fairness in administration, elimination of unjustifiable expense and delay, and promotion of growth and development of the law of evidence to the end that *the truth may be ascertained* and proceedings *justly administered.*"** FRE 102, emphasis added. As will be shown in the following section, that "search for the truth" can depend on what jurisdiction or state you are in, and this fact alone precludes ***any*** possibility that any such proceedings will be "justly administered."

Finally, what is evident from most of the cases that deal with challenges to adult entertainment legislation, the courts antagonistic to such challenges seem to take the position that adult businesses, even when utilizing the "burden shifting" procedures set forth in *Alameda Books*, impose some silent "higher" evidentiary burden on those businesses. That is totally improper. Since all these cases deal with ***civil matters,*** the burden is "***preponderance of the evidence,***" a fact lost on many courts dealing with these issues. *See Bourjaly v. United States*, 483 U.S. 171, 175, 107 S.Ct. 2775 (1987). Acceptance of this action for review can end this inappropriate practice.

III. The Refusal Or Inability of the Courts To Consistently Apply The Rules Of Evidence In Applying The *Alameda Books* Decision Has Resulted In A Denial Of Justice Throughout the Nation

As identified by Justice Souter in *Alameda Books*, there is both a reliable and "just" method to "test the hypothesis" of whether or not adult uses truly cause "secondary effects." To ensure that the issues are tested in the fairest and most relevant way (an even more fair evidentiary practice in the search for "the truth"), the existence and ***causation*** of "secondary effects" should be tested on the basis of the characteristics of specific ***types*** of adult uses. Lumping all adult uses together, especially on the sole basis of ***content***, lends itself to erroneous conclusions. To borrow a comment from Mark Twain, to evaluate all adult uses in the same thought just because of the word "adult" would be wrong, because they can exhibit characteristics that could be "the difference between **lightning and** the **lightning bug**."[11] One of the most accurate articulations of *Alameda Books* is set forth in *Giggles World Corp. v. Town of Wappinger*, 341 F. Supp. 2d 427 (SDNY 2004):

> "...The burden is upon Wappinger to ***produce evidence in support of its belief that businesses such as Giggles are likely to produce harmful secondary effects.*** *See City of Los Angeles v. Alameda Books, 535 U.S. 425, 438, 152 L. Ed. 2d 670, 122 S. Ct. 1728 (2002)* (stating that "this is not to [**9] say that a municipality can get away with shoddy data or

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[11] *See Encore Videos, Inc. v. City of Antonio*, 330 F. 3d 288 (5th Cir. 2003) and *Erotique Shop Inc. v. City of Grand Prairie*, 2006 U.S. Dist. Lexis 85992 (N.D. TX. 2006).

> reasoning. [HN12] ***The municipality's evidence must fairly support the municipality's rationale for the ordinance.***") While Defendants' ***motion for summary judgment may demonstrate that various studies show the harmful secondary effects of adult use businesses in other municipalities, Defendants still must show some evidence that Giggles' business poses a risk of causing the same type of harm.***"

Id., 341 F. Supp. 2d 427, 430-31 (SDNY 2004), emphasis added.

Unfortunately, there are scores of decisions that simply don't "get it right." A brief sampling of these decisions, decisions that have essentially ***ignored*** the presentation of magnificent and unassailable ***evidence*** "casting doubt" on the "findings" upon which various adult use restrictions have been based, include: *G.M. Enterprises v. Town of St. Joseph, Wisconsin*, 350 F.3d 631 (7th Cir. 2003); *Worldwide Video of Washington, Inc. v. City of Spokane*, 368 F.3d 1186 (9th Cir. 2004); *Center for Fair Public Policy v. Maricopa County, Arizona*, 336 F.3d 1153 (9th cir. 2003) *Kentucky Restaurant Concepts, Inc. v. City of Louisville*, 209 F.Supp.2d 672 (W.D. Kentucky 2002); *Heideman v. South Salt Lake City*, 348 F.3d 1182 (10th Cir. 2003); *Ben's Bar v. Village of Somerset*, 316 F.3d 702 (7th Cir. 2003); *S.O.B., Inc. v. County of Benton*, 317 F.3d 856 (8th Cir. 2003); *N.W. Enterprises v. City of Houston*, 352 F.3d 162 (5th Cir. 2003) *Baby Dolls Topless Saloons, Inc. v. City of Dallas*, 295 F.3d 471 (5th Cir. 2002); *Fantasy Ranch, Inc. v. City of Arlington*, 2004 WL 1779014 (N.D. Texas 2004); and *Fantasy Ranch, Inc. v. City of Arlington*, 459 F.3d 546 (5th Cir. 2006). These cases are cited just as an example of how various courts, attempting to apply *Alameda Books*, have completely

misapplied any evaluation of evidentiary "challenges" even remotely in conformity with the directives of that decision.

Emphasizing this enormous and irreconcilable conflict, there are ***scores of other decisions misconstruing*** *Alameda Books*, and this is a problem of huge constitutional significance, underscored by those decisions that actually show an understanding of *Alameda Books*, and allow the ***rules*** of evidence to be utilized in evaluating countervailing ***evidence*** and invalidating unsupported legislation, when justified by a proper evaluation of ***the truth***. Of the cases that "get it right," the clearest is *Peek-a-Boo Lounge of Bradenton, Inc.v. Manatee County, Florida*, 337 F.3d 1251 (11th Cir. 2003), *cert. denied*, 541 U.S. 988 (2004), another case where the court complains that any assessment of evidence is difficult, "because of the large number of no-clear-majority decisions of the Court in cases of this type...."

The other decisions showing a split among virtually every level of the judiciary, and specifically among the Federal Circuit Courts include: *Dima v. High Forest Township,* 2003 WL 21909571 (D.Minn. 2003)("... *Alameda Books* certainly clarifies the manner in which the Court should determine whether the municipality relied on evidence that was ''reasonably believed to be relevant' for demonstrating a connection between speech and a substantial, independent governmental interest." *Alameda Books,* 535 U.S. at 438. Here, under the standard set forth in *Alameda Books,* the Court finds that genuine issues of fact exist as to whether High Forest Township was reasonable in relying upon the studies that provided the rationale for its ordinance. Primarily, the Court finds persuasive that the studies relied upon by High Forest Township were conducted in metropolitan, not rural, areas, and the studies did not particularly examine the secondary effects of purely take-

home fare. In addition, some of the studies were more than 25 years old."); *Dima v. High Forest Township,* 2003 WL 22736561 (D.Minn. 2003)("These ambiguous reports of negative perceptions, however, are not sufficient to meet the City's burden... the additional studies provided by High Forest Township still do not survive the scrutiny of *Alameda Books."*); *Encore Videos v. City of San Antonio*, 330 F.3d 288 (5th Cir. 2003)("The city justifies this ordinance on the ground that it will reduce the adverse secondary effects [such as increased crime and the reduction of property values] of sexually oriented businesses. Therefore, in order to demonstrate that the ordinance is narrowly tailored, the city must show that the ordinance addresses these problems."); *R.V.S v. City of Rockford*, 361 F.3d 402 (7th Cir. 2004)(At this stage, courts are 'required to ask 'whether the municipality can demonstrate a connection between the speech regulated by the ordinance and the secondary effects that motivated the adoption of the ordinance.' ' *Ben's Bar,* 316 F.3d at 724 [quoting *Alameda Books,* 535 U.S. at 441, 122 S.Ct. 1728]. In other words, simply stating that an ordinance is designed to combat secondary effects is insufficient to survive intermediate scrutiny. The governmental interest of regulating secondary effects may only be upheld as substantial if a connection can be made between the negative effects and the regulated speech. In evaluating the sufficiency of this connection, courts must 'examine evidence concerning regulated speech and secondary effects.' *Alameda Books,* 535 U.S. at 441, 122 S.Ct. 1728."); *Daytona Grand, Inc. v. City of Daytona Beach,* 2006 U.S. Dist. Lexis 41164 (M.D. Fla. 2006)("The doubt created solely by virtue of Plaintiffs' systematic critique of the City's evidence is only cemented by the conclusion of Plaintiffs' experts that, based on the study of CAD data, nude dancing in Daytona Beach is not the source of crime."); *22nd Ave Station, Inc. v. City of Minneapolis*, 429 F. Supp. 2d 1144 February 17,

2007(D.Minn. 2006)("As the Supreme Court explained in *Alameda,* even if the City has made a facially sufficient factual showing to justify its ordinance, the affected party may cast direct doubt on the City's rationale by showing that the City's evidence does not support its rationale or by furnishing evidence that disputes the City's factual findings...If the affected party succeeds in casting direct doubt, 'the burden shifts back to the municipality to supplement the record with evidence renewing support for a theory that justifies its ordinance.' Plaintiff has presented sufficient evidence to cast direct doubt on the City's rationale. It has submitted both an expert affidavit and a peer-reviewed study casting grave doubt on the reliability of the foreign studies upon which the City relied. It has submitted its own recent expert analysis of Plaintiff's impact on crime, property values, and blight in its surrounding neighborhood, which shows that Plaintiff has not caused the secondary effects that the City seeks to combat. The City has provided no contrary evidence regarding the impact of 22nd Avenue Station on its neighborhood."); *Flanigan's Enterprises Inc. v. Fulton County*, 2006 WL 2927532 (N.D. Ga. 2006)("Fulton County has failed to show that the ordinance furthers an important governmental interest because it did not consider the most comprehensive analysis of the secondary effects of alcohol consumption in adult entertainment establishments. Instead, the defendants, relied on less relevant studies that supported the county's goal. Once again, this court concludes that it was unreasonable to ignore the most relevant local study in favor of a less comprehensive study and foreign studies; therefore, the ordinance is an unconstitutional restraint on the plaintiffs' constitutional rights under the First Amendment.")

The decisions construing the "shifting burden" of *Alameda Books* are truly "all over the road." What has happened is exactly what Justice Souter feared, when he

articulated his concerns with the haphazard, inconsistent and confusing evaluation (or lack thereof) of relevant evidence under appropriate evidentiary standards. Those fears were articulated, and are adopted by the Petitioner:

> "In examining claims that there are causal relationships between adult businesses and an increase in secondary effects (distinct from disagreement), and between zoning and the mitigation of the effects, stress needs to be placed on the empirical character of the demonstration available... *See Metromedia, Inc. v. San Diego,* 453 U.S. 490, 510, 101 S.Ct. 2882, 69 L.Ed.2d 800 (1981) ("[J]udgments ... defying objective evaluation ... must be carefully scrutinized to determine if they are only a public rationalization of an impermissible purpose"); *Young,* 427 U.S., at 84, 96 S.Ct. 2440 (Powell, J., concurring) ("[C]ourts must be alert ... to the possibility of using the power to zone as a pretext for suppressing expression"). The weaker the demonstration of facts distinct from disapproval of the "adult" viewpoint, the greater the likelihood that nothing more than condemnation of the viewpoint drives the regulation.[FN3]
>
> "FN3. Regulation of commercial speech, which is like secondary-effects zoning in being subject to an intermediate level of First Amendment scrutiny, *see Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N. Y.,* 447 U.S. 557, 569, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980), provides an instructive parallel in the cases enforcing an evidentiary requirement to ensure that an asserted rationale does not cloak an illegitimate governmental motive. *See, e.g., Rubin v. Coors Brewing Co.,* 514 U.S. 476, 487, 115 S.Ct. 1585, 131 L.Ed.2d 532 (1995);

Edenfield v. Fane, 507 U.S. 761, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993). The government's "burden is not satisfied by mere speculation or conjecture," but only by "demonstrat[ing] that the harms [the government] recites are real and that its restriction will in fact alleviate them to a material degree." *Id.*, at 770-771, 113 S.Ct. 1792. For unless this "critical" requirement is met, *Rubin, supra,* at 487, 115 S.Ct. 1585, "a State could with ease restrict commercial speech in the service of other objectives that could not themselves justify a burden on commercial expression," *Edenfield, supra,* at 771, 113 S.Ct. 1792.

"Equal stress should be placed on the point that requiring empirical justification of claims about property value or crime is not demanding anything Herculean. Increased crime, like prostitution and muggings, and declining property values in areas surrounding adult businesses, are all readily observable, often to the untrained eye and certainly to the police officer and urban planner. These harms can be shown by police reports, crime statistics, and studies of market***459** value, all of which are within a municipality's capacity or available from the distilled experiences of comparable communities. *See, e.g.,* ****1747***Renton, supra,* at 51, 106 S.Ct. 925; *Young, supra,* at 55, 96 S.Ct. 2440.

"And precisely because this sort of evidence is readily available, reviewing courts need to be wary when the government appeals, not to evidence, but to an uncritical common sense in an effort to justify such a zoning restriction. It is not that common sense is always illegitimate in First Amendment

demonstration. The need for independent proof varies with the point that has to be established, and zoning can be supported by common experience when there is no reason to question it. We have appealed to common sense in analogous cases, even if we have disagreed about how far it took us. *See Erie v. Pap's A.M.*, 529 U.S. 277, 300-301, 120 S.Ct. 1382, 146 L.Ed.2d 265 (2000) (plurality opinion); *id.*, at 313, and n. 2, 120 S.Ct. 1382 (SOUTER, J., concurring in part and dissenting in part). But we must be careful about substituting common assumptions for evidence, when the evidence is as readily available as public statistics and municipal property valuations, lest we find out when the evidence is gathered that the assumptions are highly debatable. The record in this very case makes the point. It has become a commonplace, based on our own cases, that concentrating adult establishments drives down the value of neighboring property used for other purposes. *See Renton,* 475 U.S., at 51, 106 S.Ct. 925; *Young, supra,* at 55, 96 S.Ct. 2440. In fact, however, the city found that general assumption unjustified by its 1977 study. App. 39, 45.

"The lesson is that the lesser scrutiny applied to content-correlated zoning restrictions is no excuse for a government's failure to provide a factual demonstration for claims it makes about secondary effects; on the contrary, this is what demands the demonstration. *See, e.g., Schad v. Mount Ephraim,* 452 U.S. 61, 72-74, 101 S.Ct. 2176, 68 L.Ed.2d 671 (1981). " Souter, J., dissenting, 535 U.S. at 458,459.

CONCLUSION

The state of confusion and chaos involving the rules of evidence as they apply to the evaluation of challenges to adult entertainment legislation is monumental. These conflicts and inconsistencies, stemming from the inability or refusal to apply the "burden shifting" analysis set forth in *Alameda Books,* justify review of this action. Such review is necessary to ensure appropriate clarification of the rampant confusion and conflict with this Court's decisions in this area, all of which show the necessity for this Court to provide clarification, guidance, and precision in this critical area of First Amendment jurisprudence. It is respectfully requested that this Court grant review in this action.

Respectfully submitted,

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APPENDIX A

IN THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT

Case No. 2D05-4547

[Filed November 22, 2006]

P.M. REALTY AND INVESTMENTS, INC., d/b/a "Club Flamingo" and "Flamingo Café," Appellant,

v.

CITY OF TAMPA, FLORIDA, a municipal corporation, and GLORIA MOREDA in her official capacity as Zoning Administrator for the City of Tampa, Florida, Appellees.

Appeal from the Circuit Court for Hillsborough County; William P. Levens, Judge

JUDGES: NORTHCUTT, SALCINES, and DAVIS, JJ., Concur.

Luke Lirot, Clearwater, and Thomas C. Little, Clearwater, for Appellant.

Richard E. Fee, Assistant City Attorney, Tampa, for Appellees.

OPINION

PER CURIAM.

Affirmed.

NORTHCUTT, SALCINES, and DAVIS, JJ., Concur.

APPENDIX B

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT, IN AND FOR HILLSBOROUGH COUNTY, FLORIDA GENERAL CIVIL DIVISION

CASE NO.: 96-02397

[Filed September 9, 2005]

CITY OF TAMPA, FLORIDA, a municipal corporation, and GLORIA MOREDA, in her official capacity as Zoning Administrator for the City of Tampa, Florida, Plaintiffs,	)
v.	)
P.M. REALTY & INVESTMENTS, INC., d/b/a "CLUB FLAMINGO" and "FLAMINGO CAFÉ," Defendants.	)

ORDER DENYING DEFENDANT'S MOTION FOR REHEARING

This cause came before this Court without a hearing upon the Defendant's Motion for Rehearing and/or Clarification filed on or about August 23, 2005, challenging this Court's Order granting a permanent injunction. The Court, having

reviewed the written submissions from both sides, and being otherwise fully advised, makes these findings of fact and reaches these conclusions of law:

FINDINGS:

A. The Order Granting Permanent Injunction was entered on August 15, 2005, after a protracted evidentiary hearing that took place over four separate days, and one additional day of final arguments. Defendants' motion for rehearing has been timely filed.

B. There has been no showing that the undersigned trial judge failed to consider any relevant evidence, or that the legislative predicate upon which the City of Tampa relied in passing the restrictive zoning ordinance was insufficient (arguments to the contrary notwithstanding).

C. This Court believes the Order of August 23, 2005, is clear and adequately addresses the appellate directive of the Second District Court of Appeal.

IT IS THEREFORE, ORDERED as follows:

1. The motion for rehearing or clarification is DENIED.

2. The provisions of the Order Granting Permanent Injunction remain intact.

DONE AND ORDERED on September 9, 2005.

/s/
William P. Levens
CIRCUIT JUDGE

APPENDIX C

IN THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY GENERAL CIVIL DIVISION

CASE NO.: 96-02397

[Filed August 15, 2005]

CITY OF TAMPA, FLORIDA, a municipal corporation, and GLORIA MOREDA, in her official capacity as Zoning Administrator for the City of Tampa, Florida, Plaintiffs,	)
v.	)
P.M. REALTY & INVESTMENTS, INC., d/b/a "CLUB FLAMINGO" and "FLAMINGO CAFÉ," Defendants.	)

ORDER GRANTING PERMANENT INJUNCTION

THIS MATTER was heard by the court on November 29 & 30, 2004, April 12 & 13, 2005 (4 days of evidentiary presentation), and July 27, 2005 (attorneys' oral argument). Appearing for the Plaintiff was **Richard E. Fee, Esq.**, Assistant City Attorney. Appearing for the Defendant was

Thomas C. Little, Esq., and **Ann Allison, Esq.** The court heard and considered sworn testimony from numerous experts as well as non-expert lay witnesses. The witnesses included:

- **Gina Grimes**, former assistant city attorney who recounted the legislative history of the zoning ordinances and identified the predicate materials that were used to support passage of the zoning restrictions,

- **Randy D. Fisher, Ph.D.**, a social psychologist who discussed the phenomenon of adverse secondary effects and called into question the City's research methodology and conclusions,

- **Terry Danner, Ph.D.**, professor of criminology who rebuffed the City's correlation between adult cabarets and serious crimes; however, he conveniently avoided commenting on prostitution, solicitation, and sexual assaults in his analysis,

- **Richard Schauseil**, real estate agent, with the Polo Group, who challenged the City's connection between property values and the proximity of adult use facilities,

- **Ethel Hammer**, land use planner who linked adult uses to various adverse secondary effects (eg., loss of confidence in neighborhoods, higher than normal absentee ownership, and high office building vacancy rates in areas near adult use facilities),

- **Jane Castor**, Tampa Police Major with the criminal intelligence unit who observed prostitution and arranging for prostitution in the vicinity of nude dance clubs and massage parlors,

- **John Sluckis**, Detective with the Tampa Police Department who saw criminal activity (sex and drugs) stemming from nude dance clubs,

- **Eric Rahenkamp**, a land use planner and landscape architect who found no correlation between adult uses and negative secondary effects,

- **Eric J. Roahrig**, a self-employed real estate appraiser who controverted the claim of negative impact on property values near adult uses,

- **Joseph Milone**, private investigaior who analyzed calls for police service in the area of Club Flamingo and found no higher rate of crime (measured by calls for police service) in the immediate vicinity of Club Flamingo, and

- **Joe Redner**, owner of adult use facilities since 1976, including the subject property, and owner of other non-adult use property near another of his nude clubs, who said that bars serving alcohol generate many more calls for police service than do nude (non-alcoholic) bars; of the City's experts' analyses he stated, *"you can make numbers do anything"*[1].

The court also has considered various reports, charts, photographs, and other items of documentary evidence. After thoughtfully considering the foregoing evidence and legal argument, the Court finds as follows:

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[1] An observation this court could find applicable to both sides' expert witnesses

Primary Issue. This essence of this case involves a constitutional challenge (facial and "as applied") to a zoning plan[2], enacted by the City of Tampa, that effectively prohibits "adult uses" within the Ybor City historic district. The City of Tampa filed this case seeking an injunction against the operation of an adult cabaret (nude dancing club) known as Club Flamingo, owned and operated by the Defendant, P.M. Realty & Investments, Inc. This property is located at 1502 E. 7th Avenue, which is within the City of Tampa and the geographical area of the historic Ybor City historic district.

History of this case. Following a temporary hearing, a temporary injunction was issued by Judge James S. Moody, Jr. on December 18, 1998, shutting down the club's three-year operation. An appeal of that injunction was taken, and the temporary injunction was upheld in *P.M. Realty & Investments, Inc. v. City of Tampa*, 779 So. 2d 404 (Fla. 2d DCA 2000) ("PM I"). A permanent injunction was subsequently sought by the City of Tampa, and granted by Senior Judge John Gilbert in 2002. An appeal from that permanent injunction was taken by the Defendant, and resulted in a reversal and the remand in *P.M. Realty & Investments, Inc. v. City of Tampa*, 863 So. 2d 1269 (Fla. 2d DCA 2004) ("PM II"), leading to the instant proceeding.

The Second District Court of Appeal, in remanding the case from "PM II", directed this trial court to re-evaluate the City's zoning ordinance, particularly its evidentiary predicate, in light of the more recently decided cases of *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002), and *Peek-A-Boo Lounge of Bradenton v. Manatee County*, 337

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[2] Ordinances creating and amending Chapter 43, and 43A, and Chapter 27, City of Tampa Code

F.3d 1257 (11th Cir. 2003), using a burden-shifting protocol[3] approved in *Renton v. Playtime Theaters, Inc.*, 475 U.S. 41 (1986). The directive of that remand has now been accomplished.

Zoning History. Beginning in 1982, the City of Tampa began enacting zoning ordinances which encompassed the Ybor City business and entertainment district area where Club Flamingo was later to be located. These ordinances, specifically the creation of YC-1 zoning category, limit the uses to which property owners can make of their property, and prescribes the permissible locations of adult use establishments. Club Flamingo was not located in a permissible location for adult usage. The zoning ordinances also require such establishments to be at least 500 feet away from any residential or office district, and at least 1,000 feet away from other adult use establishments.

The U.S. Supreme Court has repeatedly recognized that nude dancing is protected by the First Amendment, *see, e.g., Barnes v. Glen Theater, Inc.*, 501 U.S. 560, 565-66 (1991); *Redner v. Dean*, 29 F.3d 1495 (11th Cir. 1994), *cert. den.*, 115 S.Ct. 1697 (1995). Nevertheless, that same court has continued to allow local governments to restrict the location of adult use establishments through their zoning powers. *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 54-55 (1986).

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[3] The proponent of the zoning restriction (City) must show an initial justification for the zoning restriction, then the opponent may adduce evidence to "create doubt in the predicate evidence", following which the proponent may rebut the opposition evidence. In this case, I allowed the Defendant to put on additional evidence (going one step beyond *Renton*).

STANDARD OF REVIEW. The first step in evaluating the Defendants' challenge to the City's YC-1 zoning ordinance is determining the appropriate standard of review. Not every law or governmental limitation on its citizens should be looked at with the same degree of scrutiny or under the same light.[4] Some kinds of laws must be supported by a greater level of justification - a more important governmental purpose - than others.

Under the lowest standard of review, the "rational relations" review - which is used in mundane legislation (like setting speed limits), the light of scrutiny is set at its lowest level, like a 3-way light bulb set at its lowest - 25 watts - setting. Under this level of review, almost all the potential flaws in a statute remain hidden, and the courts are merely asking whether the challenged law is "rationally related" to some conceivable legitimate purpose.

Under the mid-level standard of review, or 75 watt setting, the courts will ask whether the statute or ordinance is "substantially related to an important governmental purpose". The rule or law in question in such cases must be substantially related to actually serve the government's stated objective. Courts take a more skeptical view of such laws because of the greater risk that the legislative body has acted invidiously.

Under the highest level of review, or 150 watts, any legislation that touches on a fundamental constitutional right (eg., discrimination against racial minorities) is subject to

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[4] In his book analyzing the U.S. Supreme Court, *Closed Chambers,* © Edward Lazarus 1998, the author explains the three way light analogy used herein.

strict scrutiny by the courts. Under this standard, a statute must be necessary to achieve a compelling governmental interest.

A property owner does not necessarily have a civil or constitutional right to use his land as he sees fit, just because the use itself is legal. All the 14th Amendment guarantees is that no person shall be deprived of property without due process of law. A properly enacted zoning ordinance may limit property rights, but only where due process has been observed. Based on my reading of the constitutional principles discussed in *City of Los Angeles v. Alameda Books, Inc.*, 122 S.Ct. 1728 (US 2002), reducing crime (through zoning restrictions), preserving property values, and fostering neighborhood confidence are all substantial governmental interests which subject the zoning ordinance at issue to the mid-level (75 watts) analysis. I find that the YC-1 zoning, on its face, is substantially related to multiple, legitimate governmental objectives. I further find, based on the evidence presented, that there was a proper factual foundation, or predicate, upon which the City enacted this zoning restriction.

Predicate Materials. The City's predicate materials, which form the underlying basis and justification for its restrictive zoning actions and goes back to 1982 (having been re-adopted in the zoning code at issue with the 1990 re-enactment). These materials include a report from Robert W. Taylor, Ph.D., entitled *The Impact of Adult Entertainment Centers on the Community of Tampa*, a summary of events leading to adopting of special zoning ordinance 1977-78, a transcript of testimony from a topical workshop held 7/1/82, a Time magazine article entitled *The Pomo Plague*, the U.S. Supreme Court opinion in *Young v. American Mini Theaters*, a copy of similar ordinances enacted in Detroit, Michigan, an affidavit of a Detroit resident, Mel Ravitz, and minutes of

public hearings held before, and actions taken by, the City of Tampa Council. Looking additionally at the newly presented evidence, as directed by the appellate court, the undersigned is convinced that there is a body of competent and substantial evidence from which either viewpoint could be buttressed.

This trial court's three part analysis of the City's challenged zoning, required by *Renton*, looks at the following questions:

1. Is the ordinance a complete ban on adult businesses, or is it a reasonable restriction of time, place, and manner?
2. Is the ordinance content neutral or content based?
3. Is the ordinance substantially related to an important governmental interest?

The clear and convincing evidence before me shows that in passing Section 27-191, of Ordinance No. 9101-A, the City was not trying to suppress the content of nude dancing (because it is still permitted in locations throughout the city). Rather, the City was concerned with the secondary effects of such entertainment. In other words, the City does not impermissibly ban nude dancing; it legally restricts the location where such constitutionally protected entertainment may be viewed.

The democratically-elected public officials are entitled to deference in their assessment of the evidence, its impact on the citizens of the community, and then to collectively decide whether to restrict property rights, as long as such restriction is performed in a constitutionally permissible way. The City of Tampa has done so.

It is therefore **ORDERED AND ADJUDGED** that Defendant's Renewed Motion to Dissolve Temporary Injunction is **DENIED**, and the Plaintiff's Motion for a Permanent Injunction is **GRANTED**.

DONE AND ORDERED in Tampa, Hillsborough County, Florida on this 15 day of August, 2005.

/s/
HONORABLE WILLIAM P. LEVENS
Circuit Court Judge

APPENDIX D

Tampa City Code
Chapter 27

Sec. 27-191. Termination of certain uses.

(a) Adult uses, temporary help centers and blood donor centers are uses not permitted or permissible within the Original Ybor City Historic District. All adult uses, temporary help centers and blood donor centers legally established on the effective date of the ordinance from which this article was derived shall be terminated within three (3) years of such date and the premises used for uses permitted or permissible within the district.

(b) Pursuant to section 27-177, Table 8-1, and subsection (a) above, adult uses, temporary help centers and blood donor centers are already prohibited in the Original Ybor City Historic District. Additionally, adult uses, temporary help centers and blood donor centers shall not be permitted within the boundaries of the Expanded Ybor City Historic District. If any adult uses, temporary help centers and blood donor centers were legally established and operating with all required permits and licenses within the boundaries of the Expanded Ybor City Historic District prior to the date of adoption of the ordinance which established the Expanded Ybor City Historic District, then such adult use, temporary help center or blood donor center shall be considered a nonconforming use and shall be governed by the terms, provisions and limitations set forth in section 27-297,

Nonconforming uses of major structures or structures and premises in combination.

(Ord. No. 9101-A, § 1(43A-140), 11-14-85; Ord. No. 95-255, § 11, 11-30-95; Ord. No. 2002-282, § 7, 12-5-02)

Supreme Court, U.S.
FILED
MAR 28 2007
OFFICE OF THE CLERK

No. 06-1161

In the Supreme Court of the United States

P.M. REALTY AND INVESTMENTS, INC.,
A Florida Corporation,
Petitioner,

v.

CITY OF TAMPA, FLORIDA,
A Florida Incorporated Municipality,
Respondent.

On Petition for a Writ of Certiorari to the Florida Second District Court of Appeal

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Should this Court deny the Petition for a Writ of Certiorari because: (i) the State Trial Court clearly and rigorously followed this Court's decision in *City of Los Angeles v. Alameda Books, Inc.*; and (ii) Petitioner failed to identify any way the State Trial Court departed from the accepted and usual course of judicial proceedings so as to require the exercise of this Court's supervisory power?

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 2

I. Origin of the Dispute 2

II. Pretrial and Previous Appellate History 3

III. The Trial 4

A. The City's Legislative Predicate Evidence . . 4

B. P.M. Realty Attempts to "Cast Direct Doubt" on the Predicate 6

C. The City Bolsters the Factual Basis for Its Predicate 8

D. P.M. Realty's Surrebuttal Testimony 12

IV. THE STATE TRIAL COURT'S ORDER. 14

REASONS FOR DENYING THE PETITION 14

I. The State Trial Court Correctly Determined That a Proper Predicate Exists for the City's Adult Use Zoning Regulations 15

A. The City Established the Existence of a Legislative Predicate for the Adult Use Zoning Ordinances 15

B. The Legislative Predicate for the City's Adult Use Zoning Ordinances is Legally Sufficient 16

II. The City's Adult Use Zoning Regulations at Issue Were Constitutionally Applied in the Ybor City Historic District to "Club Flamingo" 18

A. Nude Dancing Facilities, like "Club Flamingo," Generate Adverse Secondary Effects Different From Other Uses 18

B. Petitioner's Property at Issue was Treated the Same as Other Parcels in the Ybor City Historic District 18

C. It was Reasonable, Not Arbitrary, to Apply the City's Adult Use Zoning Ordinances to Petitioner 19

CONCLUSION 20

TABLE OF AUTHORITIES

Cases

City of Los Angeles v. Alameda Books, Inc.,
535 U.S. 425 (2002) . . . . . *passim*

City of Renton v. Playtime Theatres, Inc.,
475 U.S. 41 (1986) 4

DiMa Corp. v. High Forest Township,
2003 WL 21909571 (D. Minn. Aug. 7, 2003) 4

P.M. Realty and Investments, Inc. v. City of Tampa,
779 So. 2d 404 (Fla. 2d DCA 2000) ("P.M. Realty I"),
cert. denied, 786 So. 2d 580 (Fla. 2001) . . . . . *passim*

P.M. Realty and Investments, Inc. v. City of Tampa,
863 So.2d 1269 (Fla. 2nd DCA 2004)
("P.M. Realty II") 3, 4

Peek-A-Boo Lounge of Bradenton v. Manatee County,
337 F.3d 1251 (11th Cir. 2002) 4

Statutes and Rules

Chapter 27, City of Tampa Code . . . . . *passim*

Section 27-1, City of Tampa Code 19

Section 27-191, City of Tampa Code 2

Section 27-272, City of Tampa Code 1, 2

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondent, City of Tampa, Florida (the "City"), respectfully requests that this Honorable Court deny the Petition for a Writ of Certiorari (the "Petition") filed by Petitioner, P.M. Realty and Investments, Inc. ("Petitioner" or "P.M. Realty") because the Petition fails to establish that any act, omission, or issue in the case below merits this Court's review.

STATUTORY PROVISIONS INVOLVED

In addition to the City of Tampa Code section cited by Petitioner, the pertinent portion of the section reproduced below is involved in this Petition:

Section 27-272, City of Tampa Code, Regulations governing individual special uses.

The following specific standards for individual special uses shall be applied by the city council or the zoning administrator, as appropriate, in determining applications for approval, in addition to the general standards listed above in this article:

Adult use. The following specific standards shall be used in deciding an application for approval of this use:

a. Location:

1. No adult use shall be located within five hundred (500) feet of any residential or office district.

STATEMENT OF THE CASE

The State Trial Court meticulously and generously followed this Court's decision in *City of Los Angeles v. Alameda Books, Inc.*, 535 U.S. 425 (2002). Although the Petition complains that some courts encounter difficulty applying *Alameda Books*, nothing in P.M. Realty's Petition specifies any manner how, or any instance in which, the State Trial Court neglected to correctly apply the methodologies or analysis contained in this Court's *Alameda Books* opinion. Rather, the State Trial Court's Order confirms that this Court's burden-shifting analysis mandated by *Alameda Books* was rigorously followed.

In considering the Petition, it is critical to note that the Petitioner's operation of an adult use at the subject property violated two separate provisions of the City of Tampa Code. Not only did Petitioner's use violate Section 27-191, which prohibits adult uses in the Ybor City Historic District, it also violated Section 27-272, because the subject property is located within 500 feet of an office district. Either violation is separately sufficient to justify the permanent injunction entered by the State Trial Court.

I. ORIGIN OF THE DISPUTE.

In February of 1996, P.M. Realty opened a nude dancing emporium named "Club Flamingo" in the heart of the City's nationally-recognized Ybor City Historic District. P.M. Realty's sole shareholder, Joseph Redner, testified at trial that he knew he was violating the law by operating Club Flamingo as an adult use. As far back as 2000, Florida's Second District Court of Appeal concluded that P.M. Realty had opened Club Flamingo in direct violation of the City's existing zoning ordinances. *P.M. Realty and Investments,*

Inc. v. City of Tampa, 779 So. 2d 404, 407-409 (Fla. 2d DCA 2000) ("*P.M. Realty I*"), *cert. denied*, 786 So. 2d 580 (Fla. 2001).

II. PRETRIAL AND PREVIOUS APPELLATE HISTORY

The City filed its Complaint in April of 1996, seeking to enjoin P.M. Realty's operation of a nude dancing emporium within the Ybor City Historic District in violation of the City's zoning ordinances. The City's Complaint alleged P.M. Realty never obtained a Special Use Permit for the operation of an adult use, as required by Chapter 27, Code of Ordinances of the City of Tampa (the "City of Tampa Code"), and that P.M. Realty's operation of an adult use is not permitted in the Ybor City Historic District.

Following seven (7) separate days of hearings, the Circuit Court for the Thirteenth Judicial Circuit in and for Hillsborough County, Florida (the "State Trial Court") temporarily enjoined P.M. Realty from operating an adult use in the City's Ybor City Historic District. P.M. Realty appealed, and Florida's Second District Court of Appeal (the "Second DCA") unanimously affirmed. *P.M. Realty I*, 779 So. 2d 404.

Following the *P.M. Realty I* decision, the City moved for entry of summary judgment both on the City's Complaint and on P.M. Realty's Amended Counterclaim, which motion was granted. P.M. Realty appealed, and Florida's Second DCA reversed. *P.M. Realty and Investments, Inc. v. City of Tampa*, 863 So.2d 1269 (Fla. 2nd DCA 2004) ("*P.M. Realty II*").

In *P.M. Realty II*, Florida's Second DCA noted that this Court's decision in *Alameda Books*, and opinions from other

federal appellate cases[1] decided since *P.M. Realty I,* imposed a "burden-shifting scheme" for evaluating adult use zoning regulations. Consequently, Florida's Second DCA directed the State Trial Court to "accord P.M. Realty another hearing at which it applies current law to the relevant evidence."

After remand, the City filed its Amended Complaint to add an additional basis for precluding P.M. Realty's operation of an adult use at the site in question -- the site is located within 500 feet of property zoned for office use.

The State Trial Court meticulously followed the *P.M. Realty II* directives. This action was set for a two-day non-jury trial, commencing on November 29, 2004. In response to a motion by P.M. Realty, the State Trial Court issued a Corrective Case Management Order on November 10, 2004, to make it clear that "all three parts of the *Renton*[2] analysis are at issue at the final hearing" and otherwise adopted the Case Management Order. The Case Management Order described in detail the *Alameda Books*-mandated burden-shifting and evidentiary requirements to be used in the final hearing.

III. THE TRIAL.

A. The City's Legislative Predicate Evidence.

P.M. Realty incorrectly states in the Petition that the City "never put any evidence into any record before the City

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[1] *Peek-A-Boo Lounge of Bradenton v. Manatee County,* 337 F.3d 1251 (11th Cir. 2002); *DiMa Corp. v. High Forest Township*, 2003 WL 21909571 (D. Minn. Aug. 7, 2003) (D. Minn. 2003).

[2] *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 47-48 (1986).

Council to justify" and "never had a legislative predicate for" the adult use zoning restrictions at issue.[3] P.M. Realty's misstatements are betrayed by the conclusions and findings contained in the State Trial Court's Order Granting Permanent Injunction, as well as the undisputed evidence at trial.

The City opened its case by presenting evidence documenting the factual predicate supporting the adult use zoning regulations at issue. Specifically, former Chief Assistant City Attorney, Gina K. Grimes, testified regarding the re-enactment of Chapter 27, City of Tampa Code, which contains the adult use regulations at issue, in August of 1990.

The unrebutted testimony of Attorney Grimes established the existence and content of the legislative predicate supporting the preclusion of adult uses from the Ybor City Historic District and the other adult use zoning restrictions at issue. Attorney Grimes testified that she personally presented each of the City Council members with a memorandum identifying all the predicate materials regarding the adult use regulations contained in Chapter 27 and personally discussed the importance of those predicate materials with them. She further testified that the legislative predicate supporting the adult use regulations was received into the record at the public hearings. Finally, Attorney Grimes testified that the City Council members actually considered, and expressly stated their intention to rely upon, the specific predicate materials identified in the State Trial Court's Order in enacting Chapter 27 in August of 1990.

Thus, Petitioner's representation that the City did not "put any evidence into any record before the City Council" or have a legislative predicate for the adult use zoning

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[3] Petition at p.7.

restrictions at issue is flatly contradicted by the undisputed evidence at trial and the State Trial Court Order at issue.

In concluding her testimony, Attorney Grimes clarified that the enactment of Chapter 27 did not ban adult uses from the City. Rather, adult uses were and are permitted to operate within the City following the enactment of Chapter 27. Specifically, adult uses were permitted uses within the CI (commercial intensive), IG (industrial general), and IH (industrial heavy) zoning districts, subject to the restriction that adult uses must not be located within 500 feet of residential or office districts or with 1000 feet of another adult use. Once again, Attorney Grimes' testimony was unrebutted.

B. P.M. Realty Attempts to "Cast Direct Doubt" on the Predicate.

Following the City's presentation of evidence regarding the legislative predicate for the adult use zoning regulations at issue, the State Trial Court permitted P.M. Realty to present evidence in an attempt to "cast direct doubt" upon that predicate. This, of course, is the precise burden-shifting procedure mandated by *Alameda Books*.

P.M. Realty's first witness was a social psychologist, Randy Fisher, Ph.D., who attempted to critique the evidentiary value of the City's adult use zoning predicate. Dr. Fisher admitted that the studies relating to adult uses and crime he discussed during his direct examination did not include the crimes of prostitution, solicitation of prostitution, or misdemeanor narcotics offenses. He conceded that this omission from his studies reflected "incompleteness" in his analysis.

Some portions of Dr. Fisher's testimony actually bolstered the City's predicate. Dr. Fisher testified that he did not participate in any study casting doubt on City Police Chief Smith's legislative predicate testimony, which drew a correlation between adult uses and prostitution-related offences. In fact, Dr. Fisher testified that Chief Smith's presentation of crime data to the City Council is the kind of raw data on which persons can reasonably rely.

During cross-examination, Dr. Fisher admitted conducting a study which found that a large proportion of people were unwilling to live near adult uses. Dr. Fisher confirmed that his study was methodologically sound and expressed his understanding that this unwillingness of people to live near adult uses is why cities impose zoning restrictions on adult uses.

P.M. Realty's next witness was Terry Danner, Ph.D., a criminology professor who, the State Trial Court noted, "conveniently avoided commenting on prostitution, solicitation, and sexual assaults in his analysis" of the correlation between adult uses and serious crimes. Dr. Danner admitted on cross-examination that his study of crime in Ybor City during 1996, revealed a uniquely criminogenic prostitution "spike" in the crime grid containing Club Flamingo. He also admitted that his later study would have missed a uniquely criminogenic business where the crime in question was prostitution, or solicitation of prostitution, or non-forcible sexual assault.

P.M. Realty then presented Richard Schauseil as a real estate value expert, although he generated two-thirds (2/3) of his income in 2004 from non-real estate activities. Mr. Schauseil testified that he conducted a "time period analysis" to compare real estate values during the time Club Flamingo

was open with the time when it was closed. Mr. Schauseil, however, failed to compare the correct time periods. His four-year "open" period began two years before Club Flamingo opened and his three-year "closed" period included a year in which Club Flamingo was operating. Consequently, Mr. Schauseil's entire comparative study lacked validity.

P.M. Realty concluded its presentation with testimony from Jospeh Redner, its sole shareholder and operator of Club Flamingo. Mr. Redner frankly admitted opening Club Flamingo as a topless club in violation of the City's adult use zoning ordinances: "I knew I was violating the law, yes." Mr. Redner also admitted that the City's Zoning Code treated the Club Flamingo site the same as every other parcel in the Ybor City Historic District.

Mr. Redner also confirmed that his flagship nude club in the City, "Mons Venus," experienced criminal problems. Specifically, Mr. Redner testified that during a single enforcement operation at the Mons Venus, one nude entertainer was arrested for possession of cocaine and another was found to be under the age of eighteen. Finally, Mr. Redner recalled an incident where one of the Mons Venus' nude entertainers was shot in the breast while inside a car in the parking lot with her assailant, a man with whom, according to Mr. Redner, she had a "special financial arrangement."

C. The City Bolsters the Factual Basis for Its Predicate.

In accordance with this Court's *Alameda Books* decision, the State Trial Court permitted the City to present additional evidence to bolster the factual basis for the legislative predicate supporting the City's adult use zoning regulations.

The City first presented the testimony of Ethel Hammer, a land use planner with 26-years of experience in the City. Ms. Hammer testified that, as a professional land use planner, she evaluates daily the impacts of certain land uses upon adjoining uses to determine the appropriate location for those land uses.

Ms. Hammer conducted three studies within the City to test the legislative bases for the City's zoning restrictions imposed on adult uses – that their presence is linked to crime and they negatively impact surrounding residential and office properties.

In her first study, Ms. Hammer compared the rates of absentee ownership in residential neighborhoods located within 500 feet of adult uses with residential neighborhoods located within 500 feet of neighborhood bars and residential neighborhoods located within 500 feet of churches. Ms. Hammer testified that higher rates of absentee ownership, where the property owners lease rather than live on their property, evidences deterioration in a neighborhood's integrity and a loss of confidence in that neighborhood. Her study found a "much higher rate of absentee ownership" in residential neighborhoods adjacent to adult uses than in those adjacent to neighborhood bars or churches.

Ms. Hammer's second study compared the number of crimes per acre in neighborhoods located within 500 feet of adult uses with neighborhoods located within 500 feet of neighborhood bars and neighborhoods located within 500 feet of churches. Her study focused on the crimes of sexual assault, simple assault, drug offences, and prostitution. This study found a "significantly higher" average number of those crimes per acre in residential neighborhoods adjacent to adult uses than in those neighborhoods adjacent to bars or churches.

Ms. Hammer testified that the impacts of neighborhood bars and churches were very similar on adjoining neighborhoods, but the impact of adult uses stood out.

In sum, Ms. Hammer testified that her first two studies evidence that adult uses do, in fact, contribute both to a loss of confidence in the residential neighborhoods adjacent to adult uses and to an increase in crime. The data regarding absentee ownership also paralleled the legislative predicate evidence relied upon by the City.

Ms. Hammer verified the findings in her first two studies via personal observations made by driving through the neighborhoods she studied. In doing so, she observed that the residential neighborhoods located within 500 feet of adult uses demonstrated a lack of investment and upkeep. Conversely, the maintenance in neighborhoods located within 500 feet of neighborhood bars and churches appeared significantly better.

Based upon her first two studies and her observations of the residential neighborhoods studied, Ms. Hammer opined that "adult uses do have adverse secondary effects on residential neighborhoods."

Ms. Hammer's third study compared the vacancy rates of office buildings located within 500 feet of adult uses with office buildings located more than 500 feet from adult uses. Her study, based upon published quarterly reports, showed that office buildings located within 500 feet of adult uses experience much higher vacancy rates than those office buildings located more than 500 feet from adult uses.

Ms. Hammer then explained that the Ybor City Historic District is listed on the National Register of Historic Places via the National Park Service, and is one of very few such

designated areas in Florida. She also explained that the reason for prohibiting adult uses from the Ybor City Historic District was the desire to foster a compatible mix of uses, including residential and commercial uses, to promote economic development in this unique area.

In concluding her testimony, Ms. Hammer opined that adult uses do have adverse impacts on residential and office development. As a land planner, she opined that adult uses would not be compatible with other uses the City is attempting to promote in the Ybor City Historic District.

The City supplemented Ms. Hammer's testimony with the testimony of two City police personnel. First to testify was Major Jane Castor, former commander of the City's Criminal Intelligence Bureau and the supervisor for the City's law enforcement efforts regarding adult uses from 1998 through 2001. Major Castor testified that acts of prostitution were widespread in adult uses featuring nude dancing and that adult uses also served as places at which off-site prostitution was arranged. Major Castor noted that she was not aware of any land uses, other than nude dancing clubs and massage parlors, that generated prostitution. She specifically testified that she did not find any instances of people arranging for prostitution in restaurants and nightclubs.

Before resting, the City called Police Detective John Sluckis, an 8-year veteran officer involved in making prostitution arrests. Detective Sluckis testified that he was involved in numerous prostitution arrests in adult uses in the City, but never received any information about prostitution occurring in bars or restaurants in the City.

The City then argued that, under this Court's burden shifting scheme in *Alameda Books*, the proceedings were complete.

D. P.M. Realty's Surrebuttal Testimony.

P.M. Realty requested permission to call a previously unavailable witness and to recall Dr. Fisher and Mr. Schauseil in surrebuttal. Over the City's objection, the State Trial Court granted P.M. Realty's request and expressly granted P.M. Realty an additional one-half day to present the requested surrebuttal testimony. Such surrebuttal granted P.M. Realty due process protections beyond those required in *Alameda Books*.

Apparently not content with its requested surrebuttal, P.M. Realty then disclosed its intent to call a total of seven (7) witnesses over one and one-half (1½) days. Again over the City's objection, the State Trial Court ruled that P.M. Realty could present the testimony of the previously unavailable witness, recall Drs. Danner and Fisher for one-half hour each, and could also call two new witnesses, as well as recalling P.M. Realty's owner.

The trial recommenced on April 12, 2005, more than four months after the City presented its last witness. P.M. Realty first called Joseph Malone, a private investigator and process server. Mr. Malone's research of instances of prostitution, non-forcible sexual assault, and narcotics offences in the Club Flamingo's crime grid for 1996 and 1997 directly contradicted the testimony of P.M. Realty's criminologist, Dr. Danner.

Dr. Fisher was called next. He testified that he had been working on his rebuttal to Ms. Hammer's testimony for four

months. Although he took issue with her study methodology, Dr. Fisher did not present any evidence or studies to refute Ms. Hammer's factual findings regarding higher absentee ownership in residential neighborhoods and higher vacancy rates in office buildings within 500 feet of adult uses.

P.M. Realty then called one of its new expert witnesses, Eric Rahenkamp, a land use planner and landscape architect. Like Dr. Fisher, Mr. Rahenkamp did not contradict Ms. Hammer's findings, but instead criticized her methodology. Two main critiques were Ms. Hammer's inclusion of "Wild Gentlemen's Club" as an adult use, and her use of data from the Hillsborough County Property Appraiser's website. His critiques, however, were directly contradicted by P.M. Realty's other new expert witness, Eric Roahrig, who later testified that it was proper to treat "Wild Gentlemen's Club" as an adult use and to use data from the Hillsborough County Property Appraiser's website. Mr. Rahenkamp also agreed with Ms. Hammer that absentee ownership is an indicator of a declining neighborhood.

Unlike P.M. Realty's other witnesses, Erick Roahrig, a self-employed real estate appraiser, attempted to do studies to undermine Ms. Hammer's data regarding residential absentee ownership and office vacancy. Importantly, Mr. Roahrig did not quarrel with the methodology of Ms. Hammer's absentee ownership study.

Mr. Roahrig's own absentee ownership data validated Ms. Hammer's conclusion that the rate of absentee ownership of single-family residences was measurably higher in neighborhoods impacted by adult uses than those that were not. Mr. Roahrig testified, however, that his study did <u>not</u> try to determine what percentage of single-family <u>residences</u> were absentee owned.

Of note, the only portion of Mr. Roahrig's study that correctly measured the City's 500 foot setbacks confirmed Ms. Hammer's conclusion that office vacancy rates were higher in those buildings within 500 feet of adult uses than in those further away. The remainder of his study used a 1000 foot setback from adult uses, rather than a 500 foot setback. This resulted in his inclusion of office buildings beyond 500 feet from adult uses in his calculations of buildings within 500 feet from adult uses. This same error also resulted in office buildings beyond 500 feet from adult uses being excluded from his calculations of that category. Consequently, no witness contradicted Ms. Hammer's data regarding absentee ownership of single family residences or office vacancy rates. Mr. Roahrig's testimony concluded the presentation of evidence.

Closing arguments were held on July 27, 2005, and the case was submitted to the State Trial Court.

IV. THE STATE TRIAL COURT'S ORDER.

On August 16, 2005, the State Trial Court entered its eight-page Order Granting Permanent Injunction which recounts the witnesses who testified and contains in-depth legal discussion. In response, P.M. Realty moved for a rehearing or clarification, which the State Trial Court denied. P.M. Realty then appealed to Florida's Second DCA, which unanimously affirmed in a *per curium* opinion.

REASONS FOR DENYING THE PETITION

Nothing in the Petition (or in the proceedings below) justifies the granting of a writ of certiorari in this case. Indeed, the Petition fails to identify any way in which the State Trial Court (as opposed to other courts in other cases)

failed to faithfully follow the dictates of *Alameda Books*. A review of the State Trial Court's Order confirms that the evidentiary burden-shifting requirements of *Alameda Books* were not only met in this case, but were exceeded.

I. THE STATE TRIAL COURT CORRECTLY DETERMINED THAT A PROPER PREDICATE EXISTS FOR THE CITY'S ADULT USE ZONING REGULATIONS.

A. The City Established the Existence of a Legislative Predicate for the Adult Use Zoning Ordinances.

The unrebutted evidence at trial established that the City enacted the adult use zoning ordinances at issue in August of 1990. Without any doubt, Chapter 27 of the City's Zoning Code contains the adult use zoning ordinances at issue. Chapter 27 was re-adopted in August of 1990. No evidence exists to the contrary. The unrebutted evidence also demonstrated that the City submitted, and that the City Council members relied upon, predicate materials supporting the rationale for the adult use zoning regulations at issue during their adoption in August of 1990.

The legislative predicate materials identified by the State Trial Court in its order on appeal were unquestionably introduced and considered during the 1990 adoption. Attorney Grimes' un-impeached and uncontradicted testimony established that the legislative predicate materials identified in the order on appeal were expressly discussed with each member of the City Council individually, presented to City Council at public hearing, filed with the City Clerk, and the City Council expressly stated that it was their intention to rely on those materials in re-adopting the Zoning Code.

B. The Legislative Predicate for the City's Adult Use Zoning Ordinances is Legally Sufficient.

Having established the existence of a predicate at the time the adult use zoning ordinances at issue were enacted, the question becomes whether the State Trial Court reasonably concluded that the City's predicate was legally sufficient under *Alameda Books*. The clear answer to this question is yes.

The *Alameda Books* test for a legally sufficient predicate is "whether the City could reasonably rely on the proffered predicate to demonstrate that the ordinance at issue serves the legitimate governmental interest of that ordinance." 535 U.S. at 430. This Court further explained that a legislative predicate supporting adult use zoning regulations is constitutionally sound if "[t]he municipality's evidence . . . fairly support[s] the municipality's rationale for its ordinance." 535 U.S. at 438-9.

The predicate materials unquestionably demonstrate that the adult use ordinances at issue serve the City's legitimate governmental interests. Materials within the predicate support the 500 foot setback of adult uses from residentially-zoned property. Dr. Robert W. Taylor's study demonstrated that 92% of 472 City residents surveyed would not buy a house located within 500 feet of an adult entertainment center. Moreover, City Planner Tammy Jenkins stated during her presentation contained within the predicate materials that adult uses have a significant effect on neighborhood decline with a resulting lack of investment and loss of confidence in the viability of the neighborhoods.

The predicate materials also support the 500 foot setback of adult uses from property zoned for office use. Dr. Robert

W. Taylor's study found 91% of 472 Tampa residents surveyed would not locate a personal business within 500 feet of an adult entertainment center. Additionally, Police Chief Robert L. Smith testified in the predicate materials that the City Police Department received complaints from business people working next to adult businesses, including 75 complaints in a single four-month period of male patrons masturbating in the parking lots behind the cars.

Finally, the predicate materials support precluding adult uses from the Ybor City Historic District. Because the Ybor City Historic District contains residential and office zoned property, the predicate materials discussed above support the City's decision to not permit adult uses in that district.

Further, the testimony of former Police Chief Smith regarding the crime related to adult uses in Tampa supports their exclusion from the Ybor City Historic District. Police Chief Smith testified that there were 56 arrests in nude dancing bars for prostitution related and lewd and lascivious offenses. Importantly, Chief Smith expressly testified based upon his first-hand experience as a Major in charge of the vice squad having had "daily contact with the problem." Certainly, it was reasonable and not an abuse of discretion, for the State Trial Court to conclude that the City Council could have "reasonably relied" on the predicate at issue "to demonstrate that the ordinance at issue serves the legitimate governmental interest of that ordinance." *See Alameda Books*, 535 U.S. at 430.

In sum, the State Trial Court correctly concluded, and did not abuse its discretion in finding, that the City had a legally-sufficient predicate during the August of 1990, enactment of the adult use zoning ordinances at issue.

II. THE CITY'S ADULT USE ZONING REGULATIONS AT ISSUE WERE CONSTITUTIONALLY APPLIED IN THE YBOR CITY HISTORIC DISTRICT TO "CLUB FLAMINGO."

A. Nude Dancing Facilities, like "Club Flamingo," Generate Adverse Secondary Effects Different from Other Uses.

The unrefuted evidence at trial clearly supported a reasonable conclusion that nude dancing facilities generate prostitution and related offenses, while bars and restaurants do not. Additionally, the evidence at trial also established that nude dancing facilities adversely impact neighboring residential and office districts in ways that neighborhood bars and churches do not. Thus, Petitioner's Club Flamingo is precisely the type of use -- a nude dancing facility -- that generates the adverse secondary effects the City's adult use zoning ordinances are designed to address.

B. Petitioner's Property at Issue was Treated the Same as Other Parcels in the Ybor City Historic District.

Nothing about the location of Petitioner's Club Flamingo makes the application of the City's adult use zoning regulations at issue arbitrary. Petitioner's site is "being treated the same as other parcels in that area. None of the parcels can be used for adult uses." *P.M. Realty I*, 779 So.2d at 409. P.M. Realty's owner, Mr. Redner, himself admitted that the City's Zoning Code treated the Club Flamingo site the same as every other parcel in the Ybor City Historic District. Thus, no supportable claims of disparate treatment exist in this case.

C. It was Reasonable, Not Arbitrary, to Apply the City's Adult Use Zoning Ordinances to Petitioner.

The City's adult use zoning ordinances were not arbitrarily applied to the Petitioner's locus for Club Flamingo. First, the adult use zoning regulations at issue, which prohibit the location of adult uses in the Ybor City Historic District and require a 500 foot setback from office zoned property, clearly "promote or tend or be designed to promote" the intent of the City's Zoning Code. The purpose of the City's Zoning Code, in relevant part, is:

> to promote the public health, safety, morals, convenience, comfort, amenities, prosperity, and general welfare of the city and to provide, among other matters, a wholesome, serviceable and attractive community; to increase the safety and security of home life; to preserve and create a more favorable environment in which to rear children; to stabilize and enhance property and civic values . . . .

Section 27-1, City of Tampa Code. This fact is demonstrated by the City's predicate, especially as that predicate was bolstered at trial. Therefore, the City's adult use zoning ordinances are a valid exercise of the City's police power.

Sound, legitimate, and well-documented reasons support precluding adult uses, such as Club Flamingo, from locating in the Ybor City Historic District and within 500 feet of office and residentially-zoned property.[4] The State Trial Court correctly concluded and did not abuse its discretion in concluding that those ordinances, as applied to Petitioner's

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[4] Petitioner admitted Club Flamingo is located in the Ybor City Historic District and within 500 feet of office-zoned property.

nude entertainment facility, are constitutional and not arbitrary.

CONCLUSION

While other courts in other jurisdictions may (or may not) struggle with following this Court's evidentiary burden-shifting procedure set forth in *Alameda Books*, the State Trial Court clearly experienced no such difficulties. The order on appeal clearly indicates that *Alameda Books* was rigorously followed in this case and that Petitioner was afforded more opportunities to attack the City's legislative predicate than this Court requires. Simply put, Petitioner failed to carry its burden at trial despite every opportunity to do so. Petitioner failed to specify any ruling, process, or procedure of the State Trial Court that flies in the face of *Alameda Books*. For all the foregoing reasons, this Court should deny P.M. Realty's Petition and leave undisturbed the State Trial Court's August 15, 2005, Order Granting Permanent Injunction.

Respectfully submitted,

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